IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5305 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and
MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? YES

2. To be referred to the Reporter or not? YES

3. Whether Their Lordships wish to see the fair copy of the judgement? NO @@ JJJJJJJJJJJJJJJJJJJJJJJ

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO

5. Whether it is to be circulated to the Civil Judge?NO

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KUSUMBEN M PARIKH

Versus

CENTRAL BOARD OF DIRECT TAXES

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Appearance:

MR SN SOPARKAR for Petitioner

MR B.B.NAIK FOR MR. RP BHATT for Respondent No. 1 & 2.

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SPECIAL CIVIL APPLICATION No 5306 of 1991

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SHIRISH M PARIKH

Versus

CENTRAL BOARD OF DIRECT TAXES

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Appearance:

MR SN SOPARKAR for Petitioner

Mr.B.B.Naik, for Respondent No. 1 and 2.

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CORAM : MR.JUSTICE C.K.THAKKER and

MR.JUSTICE M.C.PATEL

Date of decision: 02/07/98

ORAL JUDGEMENT (PER: C.K.THAKKER J.)

Both these petitions are filed by the petitioners for appropriate writ, directing the Central Board of Direct Taxes ("Board" for short), respondent no.1 herein to condone delay in obtaining refund for assessment year 1982-83 and to order it to grant the same with interest at the rate of 18% per annum from the date of the deposit till the date of repayment of the amount.

Common questions are involved in both the petitions and it would, therefore, be appropriate to decide both the petitions by a common judgment.

It is the case of the petitioner in the first petition (SCA No.5305 of 1991) that she was an old lady of about 78 years at the time when the writ petition was filed. She was a partner in the firm of M/s Synthetic Resin and Adhesive Industries, which was a loss making concern and was declared as a sick unit. The petitioner was assessed to income tax since last several years. The petitioner paid a sum of Rs.14,300/- as advance tax for the assessment year 1982-83, but on account of various unavoidable factors, she could not file her return of income for the assessment year 1982-83. She also could not file return of income for subsequent few years. When belatedly returns were filed, no interest or penalty was levied. It is the say of the petitioner that meanwhile the Government of India declared Amnesty Scheme under which all those assesses who had not filed returns were permitted to file returns. Under the said scheme, she submitted returns on 31st March. 1987. The petitioner was entitled to refund of Rs.14,280/-. The petitioner, therefore, addressed a letter on 13th October, 1988 to the Income Tax Officer, Grievance Cell requesting him to process her return for the Assessment year 1982-83 and to grant refund. Assessing Officer replied on 31st October, 1988 that the case of the petitioner was not covered under Amnesty Scheme. Since there was delay in

submitting returns, the petitioner was advised to make an application for refund in accordance with the provisions of Sec.119(2)(b) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The petitioner has stated that as per a Circular issued by the Board, if the amount in question exceeded Rs.10,000/-, an application for refund of tax could be entertained by the Central Board of Direct Taxes and not by the Income Tax Officer. An application was, therefore, made to the Board. The said application is on record at Annexure.E, dt. 15th November 1988. In para 12, the following prayers have been made by the petitioner;

(i) The learned Income-tax Officer Circle 8(2) may please be directed to process the return of the appellant for A.Y.1982083 under the Amnesty scheme and may be further directed to grant the refund of excess advance-tax paid by the appellant.

"(ii) In the alternative the learned Income-tax Officer may please be directed to issue refund to the appellant under the provisions of section 119(2)(b) of the Income-tax Act, 1961. The appellant respectfully submits that she fulfils all the conditions laid down under the Board's Circular No.521 dated 17.8.1988 except that the amount of refund exceeds Rs.10,000/-.

(iii) The appellant prays before Your Honour that looking to the facts and circumstances of the case she is legally entitled to the refund of taxes and her claim be accepted either under the Amnesty Scheme or u/s 119(2)(b) of the Act."

(iv) The appellant therefore prays that by passing appropriate order the amount should be refunded to herand for such act of kindness she will ever remain grateful to Your Honour.

Respondent No.1 Board vide communication dt. 30th October 1990 rejected the said application. The said communication reads as under:

" F.No.212/1326/88-ITA.II
Government of India
Central Board of Direct Taxes

New Delhi, the 30th October 1990.

To
Smt. Kusumben M.Parikh
2, Vishnu Nivas Flats,
Gulbai Tekara, Ellisbridge,
Ahmedabad.

Subject: Refund - condonation of delay u/s 119(2)(b) of the Income-tax Act - Smt. Kusumben M.Parikh.

Madam,

In continuation of Board's letter of even number dated 13.12.1988 on the subject mentioned above, I am directed to state that the Board has considered your petition and declines to interfere in the matter.

Yours faithfully,

Sd.
(Nishi Nair)
Under Secretary
Central Board of Direct Taxes.

It is this order which is challenged by the petitioner in the present petition.

Almost in similar circumstances, an application came to be made by the petitioner of Special Civil Application No. 5306 of 1991 and almost a similar reply was sent to him, against which separate petition was filed.

Rule was issued and the matters are now called out for final hearing.

Mr.Soparkar, learned counsel for the petitioner raised various contentions. He submitted that the first respondent has committed an error of law in rejecting application and in not granting refund. He submitted that the case was covered under Amnesty Scheme and

appropriate relief ought to have been granted to the petitioners.

Mr.Soparkar further submitted that even if the authorities were of the view that the case was not covered under the Amnesty Scheme, Section 119(2)(b) enjoined the Board to pass an appropriate order in accordance with law regarding refund by considering the facts and circumstances in submission of the returns after the stipulated period was over and to pass appropriate order by recording reasons. He submitted that the power conferred on Board is a `power coupled with duty' and as the return could not be submitted for the reasons beyond control of the petitioner, because of fire which took place in the intervening period, the authorities were bound to exercise discretion in favour of the petitioner by condoning delay and by passing order of refund.

The action taken by the Board was judicial or quasi judicial in nature and hence such an action could have been taken after affording opportunity of hearing and after complying with the principles of natural justice and after recording reasons in support of such order. He, therefore, submitted that the orders passed by the Board are contrary to law and are liable to be quashed and set aside.

Mr.Bharat Naik for Mr.M.R.Bhatt, for the Revenue on the other hand, supported the order passed by the Board. He submitted that the Amnesty Scheme was not applicable to instant cases and the petitioners were informed about it. Regarding the orders passed by the Board, he submitted that they are discretionary and in the facts and circumstances of the case, discretion was exercised by the authority. It was not necessary either to afford opportunity of hearing or to record reasons in support of such orders. He, therefore, submitted that the orders do not require any interference in exercise of extra ordinary powers under Art.226 of the Constitution.

Now, so far as Amnesty Scheme is concerned, it is specifically observed by the Income Tax Officer when he addressed a letter to the petitioner that the cases of the petitioner were not covered by Amnesty Scheme. Nothing was pointed out as to how the said scheme was applicable to the cases of the petitioners. That contention, therefore, cannot be accepted.

We, however, see considerable force in the alternative argument of Mr.Soparkar. As extracted above,

the orders are cryptic in nature and except stating that the Board declined to interfere in the matter, no reason or ground whatsoever has been recorded in support of the decision. Even if Amnesty Scheme is not applicable to the cases on hand, from the application made by the petitioners, it is clear that the Board was also requested to exercise power under clause (b) of sub-section (2) of Section 119 of the Act and it was incumbent on the Board to consider the application in the light of that prayer and to pass appropriate order.

In Jaswant Rai and another v. Central Board of Direct Taxes and Revenue and others, 231 ITR 745 (SC), the Hon'ble Supreme Court considered the provisions of Section 271(1)(c) relating to reduction or waiver of penalty. The Court observed that the power under Section 271 (1)(c) read with Section 271(4-A) is coupled with duty to do justice and the Commissioner is under statutory obligation to exercise that power in favour of assessee if requisite conditions are fulfilled. In deciding such a matter, therefore, he has to take into account factors which are germane and to ignore grounds which are invalid or extraneous. the Board has to apply its mind and to pass an order revealing its mind by making a speaking order.

Similarly in Krishnalal v. Union of India and another, (1998) 2 SCC 392, the Hon'ble Supreme Court considered the provisions of Section 220(2-A) of the Act which deals with reduction or waiver of interest payable under Sec.220(2) of the Act. Their Lordship held that a decision to be taken in such application is quasi judicial attracting principle of natural justice. Such decision, therefore, must be made by passing a speaking order.

So far as the impugned order is concerned, no reasons and/or grounds have been stated in the order. It, therefore, suffers from that defect as also there is nothing on record to show that the Board applied its mind to the facts and circumstances of the case. The orders are, therefore, requited to be quashed and set aside.

Mr.Soparkar, straneously contended that before passing the impugned order, it was obligatory on the part of the Board not only to observe the principles of natural justice by passing a speaking order but before passing such order, it was to afford an opportunity of hearing to the Assessee. For that, reliance was placed on a decision of the High Court of Karnataka in H.S.Anantharamaiah v. Central Board of Direct Taxes and

others, 201 ITR 526. According to him, a similar question arose before the Court and in similar circumstances, under Sec.119(2)(b), the High Court held that since the power of the Board to condone delay is quasi judicial in nature, it was incumbent on the part of the Board to extend opportunity of hearing to the Assessee. He submitted that the court held that as the Board was discharging judicial function, it had to conform the principles of natural justice for which it had to afford opportunity to the parties who are going to be affected by the decision of the authority. The Board was, therefore, required to afford opportunity of hearing to the assessee, either oral or through written representation with reference to the points against the assessee for not granting relief sought and his pay should be considered and the same should be taken into account.

He also invited our attention to a decision in Comissioner of Income Tax, v. Kesoram Industries & Cotton Mills Ltd. ; 204 ITR 154 . He further stated that against Anantharamaiah (supra), decided by the High Court of Kernataka, a Special Leave Petition was filed and leave was refused by the Hon'ble Supreme Court.

In the instant cases, in our opinion, it is not necessary to enter into larger question. As is clear in both the cases, the petitioners have made applications setting out the grounds under which powers were to be exercised by the Board. The Board rejected both the applications, but without recording reasons. When the Hon'ble Supreme Court has held that such powers are quasi judicial in nature, it would be appropriate if we direct the Board to re-consider the applications of the petitioners and to decide them in accordance with law.

The Board will now consider the applications made by the petitioners in accordance with law and in accordance with the decision of the Hon'ble Supreme Court referred to hereinabove and will pass a speaking order.

For the foregoing reasons the orders at Annexure.A in both the petitions are quashed and set aside. We have no doubt that the Board will accord priority to the above cases as the matters are very old and even the petitions are also of 1991. The Board will, therefore, dispose of the matters as expeditiously as possible. Rule in each petition is made absolute to the extent indicated above with no order as to costs.

Dt. 2.7.1998. (C.K.THAKKER J.)

(M.C.PATEL J.)

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